Eighth Circuit's stay,[12] we nevertheless find the approach they represent a source of guidance for our resolution of the disputed issues in this arbitration:

> If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service.[13]

The FCC also addressed the issue of an ILEC's obligation to provide services for resale regardless of the relationship between its retail price and its cost:

> Subject to the cross-class restrictions. . ., we believe that below-cost services are subject to the wholesale rate obligation under section 251(c)(4). First, the 1996 Act applies to 'any telecommunications service' and thus, by its terms, does not exclude these types of services. Given the goal of the 1996 Act to encourage competition, we decline to limit the resale obligation with respect to certain services where the 1996 Act does not specifically do so. Second, simply because a service may be priced at below-cost levels does not justify denying customers of such a service the benefits of resale competition. We note that, unlike the pricing standard for unbundled elements, the resale pricing standard is not based on cost plus a reasonable profit.[14]

We find that GTE should resell at wholesale rates any telecommunications service it offers at retail to end users, including "below-cost"[15] telecommunications services, e.g., residential service. Our finding is not only required by the Act, but is essential to our achieving the federal and state goals of promoting competition in the local exchange market within GTE's service area in Indiana.

GTE specific offerings, e.g., grandfathered services: With regard to grandfathered services and other specific services, we recognize that GTE and Ameritech Indiana may offer different services. Therefore, the parties are ordered to tailor the determinations in the AT&T - Ameritech Indiana Interconnection Agreement to the services that GTE has grandfathered, withdrawn, or has as promotional services or discounted offerings.

Pay phones: The parties dispute whether GTE should be required to offer at wholesale rates to AT&T the following services: public coin pay phone lines; semi-public pay phone lines;

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[12] *First Report and Order* ¶¶ 863-984.

[13] *First Report and Order* ¶ 951.

[14] *First Report and Order* ¶ 956; *see also id.* ¶ 957.

[15] We make no finding as to whether such services are in fact below cost, because of the lack of credible cost information.

COCOT coin and COCOT coinless lines.[16]

AT&T argues that the services independent public payphone providers obtain from GTE are telecommunications services which should be available to telecommunications carriers at wholesale rates. AT&T cited the FCC's First Report and Order at paragraph 876 and at Rule 51.605 (subsequently stayed by the Eighth Circuit), as well as Section 251(c)(4)(A) of TA'96, to support its claim that GTE must provide the enumerated pay phone services for resale.

GTE asserts that it is not required to provide these services at wholesale rates under the Act. With regard to COCOT coin and coinless line services, GTE cites to the same paragraph of the First Report and Order, 876, to support its position that an ILEC need not make COCOT service available to independent public payphone providers at wholesale rates. GTE has offered, however, to provide COCOT coin and coinless services for resale under the terms of applicable retail tariffs. GTE argued that semi-public pay phone line service is no longer offered to subscribers at retail under GTE's local exchange tariffs, and cited to paragraph 142 of the FCC's recent pay phone order.[17] GTE further stated that it does not provide end user public payphone service at retail, and that such service therefore does not fall within the Act's resale requirements.

In order to understand this issue and each party's position, we look first to GTE's I.U.RC. Tariff No. T-2 on file with this Commission. This tariff contains references to the provision of semi-public telephone service at Section 4, 4th Revised Sheet 84, and at Section 8, 19th Revised Sheet 1.1, indicating that GTE continues to offer semi-public pay phone service to end users in Indiana. We were not able to locate any rates, terms or conditions for the provision of public pay phone service in that tariff.

Next, we review the FCC's language cited by the parties. In paragraph 876 of its First Report and Order, the FCC stated that:

> [T]he services independent public pay phone providers obtain from incumbent LECs are telecommunications services that incumbent LECs provide "at retail to subscribers who are not telecommunications carriers" and . . . such services should be available at wholesale rates to telecommunications carriers. Because we conclude that independent public pay phone providers are not "telecommunications carriers," however, we conclude that incumbent LECs need not make available service to independent public pay phone providers at wholesale rates. This is consistent with our findings that wholesale offerings

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[16] Pursuant to our November 25, 1987 Order in Cause No. 38158, Customer Owned Coin Operated Telephone (COCOT) service is referenced as Customer Owned Pay Telephone (COPT) service in Indiana.

[17] In the matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket Nos. 96-128 & 91-35 (FCC Sept. 20, 1996)[hereinafter *Pay Phone Order*].

must be purchased for the purpose of resale by "telecommunications carriers."[18]

The FCC also concluded in its Pay Phone Order that a LEC's pay phones "must be treated as unregulated, detariffed CPE [Customer Premises Equipment] in order to ensure that no subsidies are provided."[19] The parties essentially reiterated their positions in their October 15th proposed orders and accompanying briefs.

Based on the testimony presented, we find that GTE does not offer public pay phone service on a retail basis to end users in Indiana, and that it therefore should not be required as a result of our arbitration to offer such service on a wholesale basis to AT&T. As noted above, however, GTE does offer semi-public pay phone service. In determining whether GTE must offer this service to AT&T at wholesale rates, we find GTE's reliance on paragraph 142, quoted above, misplaced. That paragraph addresses customer premises equipment -- the pay phone itself -- rather than the provision of a semi-public pay phone access line. Notwithstanding our rejection of the basis GTE asserted for its position, we are unable to determine from the parties' testimony and our review of the Pay Phone Order whether semi-public pay phone service fits into the resale scheme envisioned by the Act and the FCC. AT&T did not adequately articulate a rationale for our consideration of this issue as a part of our compulsory arbitration, and we find that we do not now need to do so. The parties are of course free to negotiate further with regard to semi-public pay phone access lines, and may wish to raise the matter in the course of our separate consideration of GTE's resale tariff in Cause No. 39983.

We find that GTE must offer COCOT coin and coinless services for purposes of resale by telecommunications carriers, but that such services need not be made available to public pay phone providers at wholesale rates. Having made this determination, however, we are again faced with a dearth of evidence, this time as to whether AT&T intends to resell COCOT coin and coinless services or use such services to provide public payphones. We find that GTE must offer COCOT coin and coinless services at wholesale rates to AT&T only for AT&T's resale of same.

D. Directory Distributions

Another issue to be resolved is whether GTE should make secondary distributions of directories to AT&T's customers without charge to AT&T.

AT&T argues that it should be able to obtain this service on the same terms that GTE provides to itself, and that GTE has not demonstrated how its proposal does not result in a double recovery of costs, since directory distribution costs are included in GTE's existing retail rates.

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[18] *First Report and Order* ¶ 876.

[19] *Pay Phone Order* ¶ 142.

GTE does not want to provide this service without charging AT&T for the extra directories distributed. It asserted that the double recovery alleged by AT&T is not possible because its cost studies do not include these extra distribution costs.

We have previously found that GTE's cost studies are not persuasive in this proceeding. Therefore, we cannot make a finding as to whether GTE's cost studies include or exclude the cost of a second distribution of directories.

We find that GTE must provide this service to AT&T pursuant to the same terms GTE provides it to itself so that customers will have the most current directory available. While we agree with GTE that AT&T should pay for the service, we find that in this proceeding GTE has not provided adequate evidence that its proposal does not result in a second recovery of the same costs.

E. Parity and Service Standards

The parties disagree as to whether GTE should be compelled to provide to AT&T the same number of directory pages in the Customer Guide section of GTE's directory as GTE has for its own use for branded service information.

AT&T argued that it should be provided with nondiscriminatory access to the Customer Guide section, and cited TA'96 sections 251(c)(4)(B) and 251(b)(3) to support its claim.

GTE asserts that it has a First Amendment right to control the content of its own publication.

The Act prohibits GTE from imposing unreasonable and discriminatory limitations upon market entrants such as AT&T.[20] The FCC concluded this means an ILEC must permit a new entrant to have access to such a service as in dispute here "that is at least equal in quality to the access that the LEC provides itself."[21] "Any standard that would allow a LEC to permit access that is inferior to the quality of access enjoyed by that LEC itself is not consistent with Congress' goal to establish a pro-competitive policy framework."[22] Therefore, we find the Act, the FCC's Second Report and Order, the public interest, and our desire to promote competition in Indiana support a determination that GTE must provide AT&T with the opportunity to include information about AT&T services, including addresses and telephone numbers for AT&T

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[20] 47 U.S.C. § 251(b)(3).

[21] FCC Second Report and Order, CC Docket 96-98, Released August 8, 1996 (FCC's Second Report and Order"), ¶ 101.

[22] *Id.* ¶ 102.

customer service, on the same basis and at the same charge(s) paid by GTE for similar information, in the Customer Guide section of GTE's White and Yellow pages.

F. Unbundled Network Elements

Dark fiber: The parties cannot resolve whether the Act requires that AT&T obtain access to GTE's "dark fiber."

AT&T describes "dark fiber" as unused transmission media (e.g., optical fiber, copper twisted pairs, coaxial cable) that has no lightwave or electronic transmission equipment attached to operationalize its transmission capabilities. AT&T argues that dark fiber is a network element and is technically feasible to unbundle, and so requests unbundled access to dark fiber pursuant to the Act. GTE's position is that dark fiber is not a facility or equipment used in the provision of a telecommunications service. Therefore, dark fiber is not a network element as defined by the Act.

The FCC declined to address the unbundling of an ILEC's dark fiber because of a lack of information as to whether dark fiber constitutes a network element.[23] The Act defines "network element" as "a facility or equipment used in the provision of a telecommunications service."[24]

The record demonstrated that dark fiber is not used to provide telecommunications service until it is hooked up to equipment and becomes "lit fiber." We find that there is insufficient information in the record to convince us that dark fiber is a network element as defined in the Act, and that GTE is not required to provide access to such to AT&T.

Dedicated/Common local transport: The parties dispute whether GTE is required to provide both dedicated and common local transport to AT&T on an unbundled basis.

AT&T asserts that dedicated and common[25] are required to be unbundled per the Act and the FCC Order. In addition, GTE does not expressly claim such unbundling is not technically feasible.

GTE states that these transport elements are interconnection items under the Act, and so are not subject to unbundling. GTE agreed to treat dedicated transport as a single item and make it available out of the access tariff, and additionally to make common transport available out of

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[23] *First Report and Order* ¶ 450.

[24] 47 U.S.C. § 153.

[25] The parties have used the term "common transport" in a manner that we find to be synonymous with the term "shared" used in the FCC Order.

its access tariff.

In its First Report and Order. the FCC found that:

> We require incumbent LECs to provide unbundled access to shared transmission facilities between end offices and the tandem switch. Further. incumbent LECs must provide unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers.[26]

We find that it is technically feasible for GTE to unbundle its dedicated and common local transport elements. and that the FCC Order requires such unbundling. GTE is. therefore. to provide these two network elements on an unbundled basis to AT&T.[27]

G. Interconnection Points

The parties cannot agree on the appropriate interconnection points for the transport and termination of traffic.

AT&T requests an arrangement that gives it flexibility when selecting points of technically feasible interconnection with GTE's network. AT&T asserts that if GTE denies a request for a particular method of obtaining interconnection, then GTE must prove to this Commission that the requested method is not technically feasible.

GTE cites to no support for its position that interconnection should occur only at "minimum technically feasible points." Further. GTE claims that the flexibility requested by AT&T endangers the security and reliability of its network. but cites to no support for its claim.

Section 251(c)(2) of TA'96 requires GTE to allow AT&T to connect at any technically feasible point. GTE raised the issue of network reliability, but provided no evidence that any interconnection methods requested by AT&T are technically infeasible. The FCC concluded that "incumbent LECs must prove to the appropriate state commission that a particular interconnection or access point is not technically feasible."[28] We find that GTE did not provide the required proof in this proceeding that AT&T's request for an arrangement permitting flexibility in selecting interconnection points is technically infeasible. Accordingly, we find that the parties should adopt AT&T's proposed resolution of this issue.

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[26] *First Report and Order* ¶ 440 (emphasis added).

[27] *Id.*; *see also id.* ¶¶ 443, 444.

[28] *Id.* ¶ 198.

H. Collocation

Types of equipment and use limitations: The principal issue in dispute is whether AT&T may collocate Remote Switching Modules (RSMs).

AT&T argued generally that its RSM will be used for interconnection to GTE's network, but admits that the RSM has switching capabilities, as its name indicates. AT&T described the dispute as being whether the limited switching capacity in the RSM justifies its exclusion from GTE's collocated space.

GTE offered only a general argument that section 251(c)(6) of the Act permits competitive LECs to collocate equipment that is necessary for interconnection or access to unbundled network elements. GTE also asserts, without citing to support, that it has the right to reserve space in any facility where collocation is sought by AT&T.

We take administrative notice of Ameritech Indiana's Tariff F.C.C. No.2, 6th Revised Page 67.1, (issued January 16, 1996 and effective March 1, 1996) in which "Remote Switching Modules" are defined as: "small, remotely controlled electronic end office switches which obtain their call processing capability from an ESS type Host Office. Some Remote Switching Modules and/or Remote Switching Systems may or may not be able to accommodate direct trunks to a customer."

Further, the FCC stated in its First Report and Order that it would not "impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements."[29] Based on the above-referenced definition of RSM, as well as on the FCC's position, we find the RSM to be principally a switch, and therefore we reject AT&T's request to collocate RSMs on GTE's premises.

Use limitations: We also reject GTE's unsupported assertion of an unrestricted right to reserve space. The FCC Order states that "incumbent LECs have the incentive and the capability to impede competitive entry by minimizing the amount of space that is available for collocation by competitors."[30] GTE may "retain a limited amount of floor space for defined future uses."[31] but here GTE has not provided us with floor plans as required by the FCC to support its claim.[32]

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[29] *First Report and Order* ¶ 581.

[30] *Id.* ¶ 585.

[31] *Id.* ¶ 604.

[32] *Id.* ¶ 602.

I. Poles, Ducts, Conduits, and Rights-of-way

Most of the parties' disputes regarding access to poles, ducts, conduits and rights of way were addressed in Cause No. 40571-INT01, our arbitration of the Interconnection Agreement between AT&T and Ameritech Indiana. The remaining open issue concerns whether GTE may reserve space for its future use on/in its poles, ducts, conduits, and rights-of-way.

GTE argues that GTE owns its facilities and is entitled to reserve space for its future use, and that any other conclusion would result in a 5th Amendment "taking." GTE also asserts that as a matter of public policy, GTE has special service obligations by virtue of its status as the provider of last resort. GTE states that because of these special obligations, GTE must be able to serve new customers readily, and so must always have reserve capacity. Finally, GTE says that the plain meaning of Section 224(f)(1) of TA'96 supports its position.

AT&T responds that it does not dispute GTE's ownership rights, and is willing to pay a fair rent for the occupation of GTE's structures. However, AT&T insists that GTE is required to make its conduits, ducts, pole attachments and rights-of-way available on a parity basis, and that reserving space for its own use results in discrimination.[33]

The FCC has found that "[s]ection 224(f) requires nondiscriminatory treatment of all providers of such services and does not contain an exception for the benefit of such a provider on account of its ownership or control of the facility or right-of-way. Congress seemed to perceive such ownership and control as a threat to the development of competition in these areas, thus leading to the enactment of the provision in question. Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications . . . services would nullify, to a great extent, the nondiscrimination that Congress required. Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers."[34] Accordingly, we find that GTE may not reserve future space on its poles, ducts, conduits and rights-of-way.

J. General Contract Terms

Term: The parties cannot agree on the term of the agreement.

AT&T argued for a five (5) year term, with a price reopener after three (3) years. AT&T indicated that the bona fide request, new services, and alternative dispute resolution processes

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[33] *First Report and Order* ¶ 1170; *see also id.* ¶¶ 1123, 1157.

[34] *First Report and Order* ¶ 1170; *see also id.* ¶¶1123, 1157, 1162.

provide sufficient flexibility for changed conditions over a five year term on non-price matters.

GTE's position was the agreement should extend for two (2) years at the most. It based its position on the unprecedented nature of the Act, stating that two years is long enough for the parties to plan their business activities, and is short enough to ensure that the parties will be able to renegotiate and adjust their agreement to accommodate changes in the rapidly evolving telecommunications marketplace.

We find that GTE is in the superior bargaining position as outlined in paragraphs 10 and 15 of the FCC First Report and Order. Further, we find that two years is too short of a term, in part based on the difficulty these parties had developing mutually agreed upon contract language, and in part based on milestones that must occur before AT&T would be prepared to begin providing service as a LEC under some portions of this agreement.

We also find that AT&T's proposal for a contract terms of five years is too long because of the rapid evolution of the telecommunications market. Instead, we find that the initial term for the parties' interconnection agreement should be three years. While we recognize the greater likelihood that in only three years' time GTE will continue to enjoy the superior bargaining position of a former ILEC, we trust that any renegotiation will be reviewed in light of the relative bargaining positions of the parties at that time.

Indemnification for lost revenues: AT&T proposed contract provisions which would make GTE financially responsible for uncollectible and/or unbillable revenues resulting from GTE work errors, software alterations, or unauthorized attachments to local loop facilities. AT&T argued that GTE should be required to accept responsibility for its actions or failure to act.

GTE protested, asserting that AT&T was seeking to impose a strict liability standard upon GTE. It stated that when it makes its network or services available to AT&T, it will apply the same standards of care it applies to itself for the provision of services to its own retail customers. In GTE's view, it should not be required to "insure" collection of all revenue lost as a result of "alleged" failures in the GTE network or systems. Nor, it claims, do its cost studies include such risk.

In a standard commercial setting, where both parties desire to enter into a contract, an allocation of risk between the parties is negotiated and included in the contract. We agree with the FCC that this is not a standard commercial arrangement, in that incumbent LECs are being required to negotiate a contract. (FCC Order, ¶ 15). Consequently, it is left to us to determine reasonable commercial terms where the parties have been unable to reach agreement.

We find that a party should ordinarily be responsible for the effect on another party of its wrongful act, and that the party with greater control over the circumstances giving rise to a revenue loss should indemnify the other for the loss. Accordingly, we find AT&T's request is

reasonable and should be adopted by the parties.

K. Billing Issues

In this section, we address the parties' exchange of billing and usage information.

AT&T contends that the cost of systems development and operations for provision of operating support systems (OSS), including billing and usage recording, should be recovered by GTE in a competitively neutral manner, rather than being imposed solely on AT&T. According to AT&T, GTE is required to provide all competing carriers with non-discriminatory access to operations support systems, and operations support includes the necessary systems to record customer usage and bill customers. AT&T notes that GTE needs these systems in order to recover appropriate charges for its resold services, network elements and interconnection, just as other new entrants need them to determine what to bill their customers and what to pay GTE.

GTE's rejoinder is that AT&T is the cost-causer and thus all of the costs associated with providing billing and usage recording functions should fall on AT&T.

In discussing nondiscriminatory access to operations support system functions in its First Report and Order, the FCC concluded that "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service" is part of operations support and, therefore, is subject to provision "under just, reasonable, and nondiscriminatory terms and conditions."[35] Thus, we find that broad competitive benefits--to new entrants and to GTE--will result from the development and availability of these billing systems, and that the costs of development and implementation should be recovered in a competitively neutral manner. It would not be appropriate for AT&T to bear the full cost of the development and deployment of such systems that will eventually be utilized by reseller and facilities-based competitors. The interconnection agreement should provide that the costs of OSS (including, but not limited to, such billing systems) will be recovered in a competitively neutral manner. We find this determination consistent with the Act and the FCC Order.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. The disputed issues between the parties, as identified by the parties during the course of this proceeding, are resolved in the manner described in the Findings and Conclusions above.

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[35] *First Report and Order* ¶ 517.

2. Pursuant to Section 252(e)(1) of the Act and in accordance with the Amended Procedural Order issued in Cause No. 39983, the parties, within thirty (30) calendar days following the issuance of this Order, shall submit for the Commission's approval an executed copy of the parties' Interconnection Agreement reflecting our resolution of the disputed issues as described in this Order. The "review period" provided for in the Amended Interim Procedural Order shall commence on the date that Agreement is submitted to the Commission for approval.

3. This Order shall be effective on and after the date of its approval.

MORTELL, HUFFMAN, KLEIN, SWANSON-HULL AND ZIEGNER CONCUR: APPROVED:

DEC 12 1996

I hereby certify that the above is a true and and correct copy of the Order as approved.

Brian J. Cohee, Executive Secretary
to the Commission and Executive Director